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No. 95-1873

In The

Supreme Court of the United States

October Term, 1996

GUY E. ADAMS, et al.,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and
LIBERTY NATIONAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF AMICUS CURIAE, STATE OF ALABAMA, IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICUS CURIAE*

Several states have filed a brief that addresses concerns about the potential abuses of class action settlements, but those states, "do not take a position on the merits of the underlying dispute before the Court." (Brief for states of New York, et al., at 1.) Because this dispute arose in Alabama, the Attorney General of Alabama believes it is necessary to comment on the merits of this dispute. Although the Attorney General of Alabama shares the concerns expressed by the other states, this Brief will explain why this Court should not reverse the judgment of the Supreme Court of Alabama.

The State of Alabama has three substantial interests in this case. The first interest is consumer protection. State attorneys general have a special role in the enforcement of consumer protection laws. The Attorney General of Alabama routinely monitors class action settlements in consumer cases, intervenes in many of those cases, and objects to settlements that are contrary to the best interests of class members and other consumers. The Attorney General of Alabama recognizes, however, that settlements of class actions can provide, in appropriate cases, superior relief for complaints of consumers and, therefore, should not be discarded entirely.

The second interest is the traditional role of the States in the regulation of insurance. *See Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). This case involves a defendant insurance company sued

in its home state of Alabama, under the laws of that state. More than ninety-eight percent of the petitioners are residents of Alabama, and more class members reside there than in any other state. The regulation of the conduct of the defendant insurance company is primarily the job of the State of Alabama. A major departure from settled notions of the state processes available to resolve disputes between insureds and insurers could frustrate the regulatory schemes of several states.

The third interest of the State of Alabama is the preservation of our federalism. States have a vital interest in ensuring that the interpretation of state rules of civil procedure by state courts remains a state, not a federal, concern. As this Court has explained, "The Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution are reserved to the States, respectively, or to the people.' U.S. Const., Amdt. 10. The states thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

STATEMENT OF THE CASE

The issue in this case arises in the context of complaints that Liberty National Life Insurance Company fraudulently induced holders of a cancer insurance policy to switch to a new policy that allegedly resulted in narrower coverage for cancer patients. Liberty National contended that the complaints are without foundation and that the vast majority of its customers received better coverage under the new policies. The parties entered into

settlement discussions that the trial court found were "conducted at arms-length, without collusion," and agreed to a settlement that the court found to be "the result of hard and intense bargaining by able counsel on both sides." Pet. App. 34a, 36a.

Under that settlement, Liberty National agreed, *inter alia*, to reform its cancer policies to eliminate the new limitations on coverage that had been imposed under the new policy, provide restitution of 100 percent of the loss of benefits to cancer victims, and create two funds, totaling $4 million, to cover expenses incurred by class members in connection with treatment that would have been covered under the former policy. As an integral part of the settlement, members of the class were provided notice and an opportunity to be heard but could not opt out of the settlement, if the court approved the settlement.

Approximately one-quarter of one percent of the 400,000 class members objected to the proposed settlement. After an extensive fairness hearing, the trial court approved the settlement on the condition that the restitution be increased to 150 percent of loss, that the funds established to cover expenses be increased to $11 million, and that an agreed upon freeze on premium increases be extended. Those modifications were accepted and the settlement was approved.

With respect to the issue presented by the petitioners – approval of the class without an opt-out provision – the trial court expressly found that an opt out "would be detrimental to the interests of the class members and the class as a whole" in the light of the "inherent conflicts that would ensue between class members and individual

punitive damage suits if opt-outs were permitted." Pet. App. 85a. Specifically, the court found that "[i]f opt-out were permitted, a few class members who opt-out, if successful in their individual lawsuits, could receive an early trial and would no doubt attempt to recover punitive damages for the entire pattern and practice of conduct here, to the detriment of the remaining class members." Pet. App. 86a. Such a result, the court found, is not required by the Constitution "and is neither desirable nor appropriate." Pet. App. 85a-86a.

On appeal, the Alabama Supreme Court rejected the claims of the objecting class members that they were entitled to an opportunity to opt out of the settlement class. That a class action under Alabama Rule of Civil Procedure 23(b)(1) or 23(b)(2) "may ultimately result in money damages does not prevent class certification," the Court held, concluding that "so long as the relief sought is primarily equitable or injunctive, a class action settlement that also includes money damages with a non-opt-out provision is proper." Pet. App. 12a (emphasis in original) (*citing White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert denied*, 115 S. Ct. 2569 (1995)). The Alabama Supreme Court further determined that the relief awarded in this case was primarily equitable in nature, because the most significant relief was reformation of the insurance contracts and an injunction preventing Liberty National from switching insurance policies without providing certain information. Accordingly, the court held that the absence of an opt-out procedure in this case did not render the certification and settlement unconstitutional.

As to fairness of the terms of the settlement itself – which is not at issue before this Court – the Alabama Supreme Court found that the trial court had not abused its discretion in approving the settlement and that it had given due consideration to the appropriate factors, including the likelihood of success at trial, the range of possible recovery, the complexity, expense and duration of the litigation, the substance and amount of opposition to the settlement, the stage of the proceedings at which the settlement was reached, and the financial ability of Liberty National to withstand judgments in the absence of a settlement. Pet. App. 17a.

SUMMARY OF ARGUMENT

This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. Although the petitioners – more than ninety-eight percent of whom are from Alabama – note that the plaintiff's attorney and the lower courts have a reputation regarding large punitive damages, the petitioner's main objection is that the class settlement deprives them of the opportunity to pursue that speculative but potentially lucrative remedy. The Due Process Clause of the Fourteenth Amendment does not guarantee the right to participate in a punitive damages lottery in which compensation may be denied to most of those injured in a mass tort case.

There are three important state interests at stake here. The first interest is consumer protection. This Court

should not deprive consumers of the ability to obtain broad and meaningful relief through the use of mandatory classes in appropriate cases. The second interest is federalism. This Court should defer to the reasonable determination of the Supreme Court of Alabama that this settlement provides primarily equitable relief. That deference is particularly appropriate in this case where more members of the plaintiff class reside in Alabama than in any other state and the defendant is an Alabama insurance company. The third interest is in preserving the settled law regarding Federal Rule of Civil Procedure 23 and the state rules that follow that model. That interest is especially strong in this insurance case, because insurance regulation is traditionally the province of the states. Alabama law extends to policyholders and insurers a procedure borrowed from the federal courts to resolve disputes in a manner that affords substantial relief to every policyholder. That procedure also promotes judicial economy in immeasurable ways.

ARGUMENT

This case is not what it may first appear to be. Although this case arose in the Circuit Court of Barbour County, Alabama, which, as the petitioners note, has a reputation for frequent and large punitive damages awards, the settlement of this case does not conform to that reputation. This case involves a settlement that primarily reformed the cancer insurance policies of approximately 400,000 policyholders who were allegedly defrauded by an Alabama insurance company. The petitioners – more than ninety-eight percent of whom are

Alabama residents – are a vocal but tiny fraction of those policyholders who object to the settlement, because they want to pursue speculative but potentially lucrative legal remedies, particularly punitive damages. The petitioners are not advocates of civil justice reform: The petitioners cast aspersions toward the reputation of the lower courts and the national reputation of the plaintiff's attorney, but the petitioners' real objection is that they have been denied the opportunity to participate in a system where large punitive damages may be awarded to a few and compensation may be denied to most members of the plaintiff class.

This Court, of course, should never shirk its duty of enforcing the fourteenth amendment and ensuring that due process is afforded by every state to every citizen. There may be instances in which class actions are settled in a manner that raises substantial issues regarding due process. This Court should be vigilant in its review of potentially abusive class actions. This Brief will explain, however, some of the reasons why this case does not warrant the intervention of this Court.

This Argument is divided into three parts. Part one addresses the propriety of using a mandatory class action to protect consumer interests. Part two addresses the federalist concern that this Court should defer to the determination of the state courts regarding the primary nature of the relief in a class action settlement. Part three addresses the need to preserve settled notions of the propriety of mandatory class actions, particularly as they relate to the traditional role of the states in regulating insurance.

I. The Ability to Settle Litigation Through the Use of Mandatory Classes, in Some Cases, is Necessary to Protect Consumer Interests.

The issue in this case has significant implications for all parties interested in the just and efficient resolution of otherwise unwieldy and cumbersome public interest litigation. During the past several decades, our legal system has seen an explosion in the incidence of mass tort litigation and in other litigation involving the individual claims of, in some instances, hundreds of thousands of individuals. These claims may involve product liability disputes, civil rights violations, or anticompetitive practices, just to name a few. At the same time, however, the number and the scope of claims involved in these disputes threaten to overwhelm the legal system and to delay indefinitely the resolution of claims that plainly should be redressed. Although sound public policy demands that those who are injured by massive fraud or negligence have the opportunity to pursue their claims, it likewise demands that there be some mechanism for gaining final, binding, and effective relief, and ensuring that the interests of all those injured – not just a select few – are protected. In many, if not most, cases fitting under this rubric, the class action is an appropriate and fair mechanism for securing justice.

The interests of consumers provide support not only for proceeding through the mechanism of a class action but for the swift and efficient resolution of these disputes through settlement. To achieve settlements in these circumstances, the absence of an opt-out provision may be a fundamental prerequisite. Unless a defendant facing hundreds or thousands of claims can know with certainty

that all of those claims will be resolved, there is little or no incentive to enter into far-reaching settlements with most of the class. Especially in this time of large punitive damage awards, the presence of even a handful of remaining litigants offers a sufficiently ominous future liability potential that there is little to be gained from resolving even a large majority of claims. If the Supreme Court rules that an opt out is required in all circumstances, therefore, multiple individual lawsuits will be the order of the day.

A regime in which multiple individual lawsuits are the means to resolve mass tort or fraud claims, however, can be inherently unjust to most of the alleged victims of those actions. Although the first plaintiffs in the door may well fare better than under a class settlement by securing massive punitive damage awards, they do so at the expense of the majority of the members of the class, for whom nothing will be left once the first few plaintiffs take all available funds. Plaintiffs securing large punitive damage awards will be much more than compensated for any injury, while many others suffering the same injury will be left with nothing. Furthermore, the multiplication of litigation itself will only increase the likelihood of unjust results. No public policy interest of which we are aware is served by such an arbitrary regime, and those state officials charged with responsibility for consumer protection have a keen interest in preventing such a result.

This Court should be mindful of the utility of mandatory classes and the damage that would be wrought if settlements involving such classes could be undone by an

unhappy few seeking the windfall of large punitive damage awards and attorneys' fees without regard to the interests of other class members or the public policies served by class action settlements. If the petitioners in this case had been permitted to opt out and pursue individual compensatory and punitive damages claims, the settlement may not have occurred, the policies may not have been reformed, and the restitutionary remedies may not have been offered, all to the detriment of the class as a whole. The Supreme Court should preserve the continuing ability of class representatives and defendants to work out mutually beneficial solutions in the best interests of the class as a whole and reject petitioners' effort to deprive the legal system of the ability to facilitate such results.

II. The Supreme Court Should Defer to the Determination of the Alabama Supreme Court that the Relief Provided Under State Law was Primarily Equitable.

As the matter has been presented in the petition (see, e.g., Pet. at 21), and as the Supreme Court framed it in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the key question is whether the relief at issue in this state law cause of action arising in state court was wholly or predominantly a money judgment. While the Court in *Shutts* determined that – at least as a matter of personal jurisdiction in that case – an opt-out requirement was an element of due process, it expressly limited its holding to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments," and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief."

Shutts, 472 U.S. at 811 n.3. In this case, following the lead of *Shutts*, the Alabama Supreme Court determined that the relief was primarily equitable or injunctive and, therefore, a mandatory class settlement was proper.

In asking this Court to reverse the judgment, the petitioners have asked this Court to override a state supreme court's characterization of the relief approved in a state law action as equitable or legal in nature. That question, however, is and should be primarily one for the state supreme court. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."). The interests of the States as participants in our federal system require that state institutions – such as the Alabama Supreme Court – determine the appropriate meaning, content, and characterization of state law.

This class action plainly should have been brought in Alabama. More members of the plaintiff class reside in Alabama than in any other state, and more than ninety-eight percent of the petitioners reside in Alabama. The defendant is an Alabama insurance company regulated under Alabama law. This case is not the archetypical abusive class action brought by less than able representatives in a forum that is too distant for the vast majority of the members of the plaintiff class and has only a remote connection with the defendant. Indeed, the plaintiff's attorney has a national reputation for securing generous awards for his clients, particularly in the trial court where this case was filed.

In any event, the characterization of the primary relief as equitable was reasonable and should not be disturbed. The plaintiffs in this litigation complained that they had been fraudulently induced to switch their cancer insurance to new policies providing less comprehensive coverage. As part of the settlement, the defendant agreed to a reformation by which the earlier coverage was restored. That reformation resolved the central issue in the dispute for the vast majority of members of the class, who had made no claims under any cancer policy. Reformation, of course, is an equitable remedy that does not involve monetary relief. To be sure, for some members of the class, a restitutionary remedy accompanied the reformation, while others were entitled to receive monetary relief from one of the damages funds. But the presence of some monetary relief for some members of the class does not undermine the obvious conclusion that the nonmonetary restitutionary remedy was entirely sufficient to meet the primary complaint that the new cancer policy provided reduced coverage.

III. The Supreme Court Should Not Upset the Settled Determinations Reflected in the Federal Rules of Civil Procedure and in State Procedural Rules Modeled on the Federal Rules that an Opt-Out is Not Required, or Beneficial, in all Class Actions.

The rule urged by petitioners would undo the carefully crafted and considered judgments of Rule 23 of the Federal Rules of Civil Procedure and the many state class action rules modeled on the Federal Rules. Under those rules, only classes certified pursuant to Rule 23(b)(3) must provide an opt-out right. The petitioners, however,

would have the Court rewrite those rules through constitutional fiat by requiring as a matter of the Due Process Clause that a great many more classes be accompanied by an opt-out right. If the Court imposes an opt-out requirement where the rules do not presently call for such an option, the settled and tested distinctions found in Rule 23 would be erased and the utility of class actions would be reduced in areas where they are arguably needed most.

This Court has long recognized that a judgment in a class action may bind absent members of the class so long as the class members were adequately represented. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). In the settlement context, due process may also requires notice and an opportunity to be heard. The Supreme Court of Alabama found that these traditional requirements were satisfied in this case.

This Court in *Shutts* made clear its reluctance to "require the invalidation of . . . the class action provision[s] of the Federal Rules of Civil Procedure." 472 U.S. at 813. Those provisions were crafted with the benefit of the considered judgment of their drafters and have been tested over time in hundreds of cases. Judicial economy in both state and federal courts has been advanced enormously by the use of class actions. In the interests of comity and federalism, this Court should be all the more reluctant to invalidate state procedural rules patterned on the federal model.

This is particularly true in the context of an insurance case. Regulation of insurer practices and protection of the interests of insureds has traditionally been the province

of state insurance commissioners, who are cognizant of local needs and conditions and have considerable experience in the area. This is not to say that court actions that might affect insurer practices and solvency are preempted, but the predominant role of state regulation strongly suggests that state law procedures should not be displaced in a manner that seriously undermines the state regulatory system. *See Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316 (1955) ("The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Here Alabama law provides policyholders and insurers a means of resolving a dispute such as the present one in a manner that affords real relief to every class member, while affording finality and certainty to the insurer concerning its obligations. Petitioners' position would deny that option as a matter of federal law, jeopardizing the interests of insured and insurer alike and the interests of all states in promoting judicial economy. State officials have a keen interest in resisting such an unsettling intrusion, which threatens to disrupt carefully crafted regulatory and judicial regimes.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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